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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1971

No. 71–462

GLENN W. BRICKER
Petitioner

vs.

SCEVA SPEARE MEMORIAL HOSPITAL
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF NEW HAMPSHIRE

BRIEF FOR THE TOWN OF ASHLAND, NEW HAMPSHIRE, AMICUS CURIAE

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INTEREST OF AMICUS

The Town of Ashland is a political subdivision of the State of New Hampshire, a rural community located in the center of the State, with a population of approximately 1400. It is located about 6 miles from the Town of Plymouth, the location of Respondent. There is no public transportation between the Town of Ashland and the Town of Plymouth. Ashland has only one doctor, Petitioner above, and the nearest hospitals other than Respondent are about 25 miles distant, in the Cities of Franklin and Laconia. Historically, Ashland has had difficulty both in obtaining and in retaining physicians to maintain active practice there. The two physicians who preceded Petitioner in the Town left established practices there to relocate. As is noted in the opinion of the New Hampshire Supreme Court in

the decision from which this appeal is taken, "The Town of Ashland is deprived of effective medical service by the failure of the board to reappoint the plaintiff."

The Town of Ashland has a direct financial interest in the operation of the Respondent, in that the Town at its annual meetings in past years has appropriated and paid to Respondent public funds for general use by Respondent. In addition, the Town has also paid public funds to Respondent for services rendered to Town Welfare recipients.

During the year 1970 the Respondent received $729,823.20 as gross income from services of which the sum of $130,638.35 was received from the United States government for the care of patients under the Medicare Program and an additional sum of $21,894.70 was received from the Federal and State governments for the care of patients who were welfare recipients. In addition thereto the Respondent received approximately $77,000.00 from the United States government under the provisions of the Hill-Burton Act for the construction of a $260,000.00 addition to the facilities during 1970 and 1971.

During the year 1970, 336 residents of your amicus were patients treated in Respondent, many of whom were under the care of the Petitioner. A total of 2235 patients were treated in Respondent in 1970. During the five years preceeding the institution of the within matter, Petitioner annually admitted and treated an average of approximately 250 patients in the Respondent (Exhibit 12).

Your amicus has been granted leave in the Supreme Court in the State of New Hampshire to appear as a friend of that court.

QUESTIONS PRESENTED

1. Is a state chartered hospital which receives twenty percent of its operating funds from federal, state, and local governmental sources; which has in recent years received Federal Hill-Burton Act funds in excess of $75,000.00 representing thirty percent of its current capital expansion program; which is subject to state and federal control of its operating procedures; and which is the sole hospital within a twenty-five mile radius of its location; so linked with state action and the public interest that its proceedings in removing a tenured physician from its staff are subject to the procedural and substantative limitations set forth in the Fifth and Fourteenth Amendments to the Constitution of the United States?

2. Did such hospital, in its said proceedings, adhere to the minimum requirements demanded by fairness under such Amendments where those conducting the same consciously refused to give Petitioner, either before or after the hearing upon which the removal decision was based, a statement of the charges which were the bases of the removal proceedings, or of the reasons upon which the decision was reached?

3. Did such hospital, in its said proceedings, act arbitrarily, capriciously and unreasonably, where it failed to follow the requirements of its own by-laws; where it refused, prior to the hearing upon which the removal decision was based, to give Petitioner a statement of the charges which were the basis of the removal proceedings; where its decision was not based upon Petitioner's alleged lack of medical skills or upon alleged moral misconduct adversely affecting his professional qualifications; and where the evidence considered in the course of said proceedings included the fact that Petitioner testified for plaintiffs in malpractice actions?

4. Are the residents of a town served by a staff physician of such hospital denied equal protection of the laws where the decision of such hospital to remove such physician from its staff is based on grounds other than the quality of the care rendered by said physician to his patients in said hospital or said physician's alleged moral misconduct?

STATEMENT OF THE CASE

The Respondent hospital is a voluntary charitable corporation organized and existing under the provisions of Chapter 292 of the New Hampshire Revised Statutes Annotated. As such, it is subject to the control of the State of New Hampshire as to its operating procedures under the provisions of Chapters 151 and 152, New Hampshire Revised Statutes Annotated, and is subject to the control of the State as to certain aspects of its construction programs under the provisions of Chapter 152. It is a recipient of Hill-Burton Act funds under 42 U.S.C. 291, and 30% of the funds used in a recent $260,000.00 building program came from that source. The balance of such building funds came from public contributions. In 1970, the most recent year for which figures are available, 20% of its operating funds came from federal, state and local governments or governmental programs. It is the sole hospital within a 25-mile radius of its location.

The Respondent is governed by a president, vice-president, secretary, treasurer and assistant treasurer, and eighteen other persons, all of whom are denominated "trustees". The day-to-day operation of the hospital is conducted by a professional hospital administrator. Respondent's by-laws provide that appointments to the medical staff are to be made by the board of trustees prior to June 30 of each year, for terms of one year, upon the recommendation of the active medical staff. The active medical staff, sitting as a credentials

committee, is charged with reviewing annually all staff appointments. At the time the within cause of action arose, there were ten active members on the active medical staff, including Petitioner, who had been a staff member since 1963 and an active medical staff member since 1966.

Contrary to the requirements of the by-laws, the annual meeting of the active medical staff in 1970 was not held until August 21. Petitioner received notice of this meeting by postcard, but was hospitalized out of town at the time and unable to attend. The remainder of the active medical staff present at the August 21 meeting recommended re-appointment of all of the active staff except Petitioner. On August 24, the active medical staff, sitting as the credentials committee, again held a meeting. No written notice was given of this meeting to anyone, and Petitioner did not receive oral notice although he was a member of the committee. He was still in an out of town hospital and unable to attend. At this August 24 meeting, the credentials committee voted unanimously not to recommend the reappointment of Petitioner. Petitioner was informed of this decision on August 25, 1970 by Mr. Beaulieu, the hospital administrator.

Petitioner thereafter sought to discover the nature of the charges which were apparently discussed at the August 24 meeting, and the reasons for the decision reached. No list of specified charges was ever made available to him, nor was he ever given any reason for the decision reached on August 24. Petitioner also requested in accordance with the by-laws a hearing before a joint session of the credentials committee and the Joint Conference Committee, which latter body is comprised of the president and vice-president of both the medical staff and the board of trustees, with the hospital administrator a member ex officio. Petitioner's last request was granted and a hearing was held on October 14. All

persons entitled to attend were present, including Petitioner. The meeting concluded without decision. The Respondent's board of trustees met on October 19, and accepted the recommendation then made by the Joint Conference Committee that Petitioner not be reappointed. Petitioner was informed of the fact of, but not the reasons for, this decision on October 20.

Petitioner thereafter immediately sought, pro se, a temporary order, in the New Hampshire Superior Court reinstating him on the staff of Respondent. This request was denied. On appeal from this denial, the New Hampshire Supreme Court returned the action to the Superior Court for hearing, after which hearing a temporary injunction was issued on December 1, 1970. The injunction forestalled Respondent from denying Petitioner the use of its facilities until the disposition of the within cause, and is still in effect. Petitioner has during the period from December 1, 1970, to date, been admitting patients to Respondent, and has performed a number of surgical operations in Respondent using the latter's facilities.

The matter came on for hearing on the merits in May, 1971, and after hearing, the court below on May 17, 1971, dismissed Dr. Bricker's petition to be reinstated to active staff membership at Respondent. On appeal, the New Hampshire Supreme Court affirmed. The within petition is an appeal from the said decision of the New Hampshire Supreme Court.

REASONS FOR GRANTING THE WRIT

I. THE NEW HAMPSHIRE SUPREME COURT ERRED BELOW IN REFUSING TO FIND THAT RESPONDENT IS A PUBLIC INSTITUTION.

The record below is replete with evidence that Respondent

is a public rather than a private institution. It is subject to state and federal regulation of its operations under the previously cited New Hampshire and Federal laws. It receives Federal, State and local funds for operating and capital purposes, in that 20% of its operating budget and 30% of its capital budget comes from these sources. It operates in the public interest, has a monopoly on hospital services in its area, and is controlled by trustees who in law and in fact have a fiduciary capacity. More than half of its non-operating income comes from public contributions. As a charitable institution, it receives local, state and federal tax exemptions. These facts are sufficient to support the contention that Respondent is a public hospital, and that the acts of respondent constitute state actions. Chiaffitelli v. Dettmer Hospital, Inc., 437 F. 2d. 429 (C.A., 6th Circuit, 1971); Sosa v. Board of Managers of Val Verde Memorial Hospital. 437 F. 2d 173 (C.A., 5th Circuit, 1970); Meredith v. Allen County War Memorial Hospital, 397 F. 2d 33 (C.A., 6th Circuit, 1968); Simkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 959 (C.A., 4th Circuit, 1963).

In none of the cases cited by the New Hampshire Supreme Court in support of its finding that Respondent has a private character, is there present that degree of State control set forth in New Hampshire Revised Statutes Annotated, Chapters 151 and 152. The interpretation put on the above facts by the opinion below is strained indeed, and the fictitious dichotomy between a "public" and "private" hospital sought to be preserved by the New Hampshire Supreme Court in the case at bar has no relationship to the realities of the situation as it affects the literally vital interests of the residents of your amicus. Respondent is in fact a public institution, and should be so held by this court.

II. WHERE RESPONDENT IS A PUBLIC INSTITUTION, AND ITS ACTS CONSTITUTE STATE ACTS, RESPONDENT'S PROCEEDINGS IN REMOVING PETITIONER ARE THEREFORE SUBJECT TO THE PROCEDURAL AND SUBSTANTIVE LIMITATIONS OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITION OF THE UNITED STATES.

Chiaffitelli v. Dettmer Hospital, Inc., supra; Sosa v. Board of Managers of Val Verde Memorial Hospital, supra; Sams v. Ohio Valley General Hospital Association, 413 F. 2d 826 (C.A. 4th Circuit, 1969); Meredith v. Allen County War Memorial Hospital, supra; Simkins v. Moses H. Cone Memorial Hospital, supra; Citta v. Delaware Valley Hospital, 313 F. Supp. 301 (D.C. Pa., 1970).

III. RESPONDENT FAILED IN ITS PROCEEDINGS TO REMOVE PETITIONER FROM ITS STAFF TO MEET THE STANDARDS REQUIRED OF STATE ACTION BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The most concise statement of the due process requirements of the Fifth and Fourteenth Amendments to the United States Constitution as they apply to hearings of the type at issue here, is set forth in the opinion of Judge Suttle in the District Court opinion in the Sosa case. "(D)ue process requires an applicant be afforded at least the following: (1) Notice of time and place of hearing; (2) a hearing before a properly authorized body; (3) A right to produce evidence and rebut that against him; (4) Consideration and findings as to specific qualifications based upon the evidence submitted; (5) Notification of where and why the applicant fell short, if refused; and (6) an appeal or final opportunity to rebut."

Sosa v. Board of Managers of Val Verde Memorial Hospital _____ F. Supp. _____ (D.C.W.D. Texas, 1970). Petitioner's hearing before the Credentials Committee and the Joint Conference Committee on October 14, 1970, would in the view of your amicus meet the requirements set forth under (1) and (2) above. However, throughout the remainder of the proceedings, Respondent failed to meet even the above "minimum demanded by fairness".

Not being given a list of the charges against him, Petitioner had no effective opportunity to produce and rebut evidence against him. No findings of the Credentials Committee and Joint Conference Committee were ever submitted to Petitioner. No notice was given to Petitioner of where and why he failed to be reappointed. No appeal or opportunity to be heard before Respondent's Board of Trustees was ever granted Petitioner. Thus Respondent has failed to meet four out of the six minimum requirements set forth by Judge Suttle. Failing this, Respondent's actions in failing to reappoint Petitioner should be declared null and void, and Respondent should be ordered to reinstate him to its staff forthwith. Sams v. Ohio Valley General Hospital, supra.

IV. EVEN IF RESPONDENT IS FOUND TO HAVE RETAINED ITS PRIVATE CHARACTER, ITS ACTIONS MAY NOT BE ARBITRARY, CAPRICIOUS OR UNREASONABLE.

See opinion below of the New Hampshire Supreme Court, and cases cited therein.

V. THE COURT BELOW ERRED IN FAILING TO FIND THAT RESPONDENT, IN ITS PROCEEDINGS TO REMOVE PETITIONER FROM ITS STAFF, ACTED ARBITRARILY, CAPRICIOUSLY AND UNREASONABLY.

Your amicus submits that the following acts of respondent, when taken together, show that the entire removal proceedings were arbitrary, capricious and unreasonable:

1. Petitioner was given no notice of the August 24, 1970 meeting at which his reappointment was denied, despite his being a member of the credentials committee.

2. The meeting of August 24 was an extraordinary meeting, held some two months after the period prescribed in Respondent's by-laws for annual credentials committee meetings, yet only oral notice was given to those in attendance.

3. No statement of the reasons for the decision reached at the August 24 meeting was ever given to Petitioner prior to the October 14 hearing before the credentials committee and the Joint Conference Committee.

4. No statement of the charges to be presented at the October 14 hearing was given to Petitioner.

5. Respondent's President stated under oath with reference to the October 14 meeting that "Dr. Bricker, in a phone conversation, at least, asked me what the particular charges were, which I construed to be asking, in a sense, of giving him a list against, for which he could erect a defense, I guess you might say, and this certainly was not my idea of how the meeting should be conducted."

6. Evidence at the October 14 hearing included evidence that Petitioner testifies in medical malpractice cases on behalf of plaintiffs.

7. No evidence of Petitioner's alleged lack of medical competence or moral recitude has ever been adduced at any of Respondent's proceedings.

The foregoing compendium is legally sufficient to make Respondent's proceedings void. Sussman v. Overlook Hospital Ass'n, 95 N.J. Super. 418, 231 A. 2d 389 (1967); Chiaffitelli v. Dettmer Hospital, Inc., supra; Sosa v. Board of Managers of Val Verde Memorial Hospital, supra; Sams v. Ohio Valley General Hospital Association, supra; Meredith v. Allen County War Memorial Hospital, supra.

VI. THE RESIDENTS OF YOUR AMICUS HAVE SUCH A SIGNIFICANT LEGAL INTEREST IN THE WITHIN PROCEEDINGS THAT RESPONDENT SHOULD BE PERMITTED TO DENY THEM FREEDOM OF CHOICE OF THEIR PHYSICIAN AND THE HOSPITAL PRIVILEGES USUALLY APPURTENANT TO SUCH CHOICE, ONLY ON A SHOWING THAT ITS REFUSAL OF STAFF PRIVILEGES TO PETITIONER WAS BASED ON CONSIDERATIONS WHICH AFFECT THE QUALITY OF MEDICAL SERVICE AT RESPONDENT.

42 U.S.C. 291 gives private citizens a right of action to enforce compliance with its provisions. Cook v. Ochsner Foundation Hospital, 319 F. Supp. 603 (D.C.E.D. La., 1970). The citizens of Ashland, New Hampshire, as United States citizens and taxpayers, have a right, therefore, to insist that Respondent as recipient of Hill-Burton Funds, adhere to the letter and spirit of the law which provides those funds. Among these is the concept that all citizens should share to the fullest extent possible in the benefits provided by the Hill-Burton Act, and that Respondent should deny the use of its facilities to Petitioner and those whom he seeks to treat there only upon a showing that medical services at Respondent will suffer because of Petitioner's presence on its active medical staff. The record below is singularly devoid of any showing that Petitioner's presence caused the quality of care at Respondent to deteriorate. Petitioner's medical competence

is fully conceded by all. The most that any of the opinions below could say of his presence was that it was "disruptive". The adjective used in Justice Johnson's opinion is left standing without the support of findings of declining medical care. In the absence of such findings, the Petitioner should be ordered reinstated to Respondent's active staff, with full privileges.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of New Hampshire.

Respectfully Submitted,

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October 26, 1971